Supreme Court, U.S.
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No. 00-1685

IN THE

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Oklahoma

APPENDIX TO PETITIONERS' CONSOLIDATED REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 14, 2001

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-2000-2052

THE STATE OF OKLAHOMA, ex rel, Moshe Tal, a resident taxpayer of The City of Oklahoma City, Oklahoma & Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Plaintiffs,

vs.

The City of Oklahoma City ("City"), Oklahoma, a municipal corporation; et al.,

Defendants.

CONSOLIDATED REPLY OF DEFENDANTS BRICKTOWN TMK/HOGAN ENTERTAINMENT, L.L.C., BRICKTOWN PARKING INVESTORS, L.L.C., BRICKTOWN TMK/HOGAN PARKING L.L.C., OKC ATHLETIC CLUB LIMITED PARTNERSHIP, BAP-BRICKTOWN L.L.C., TMK/HOGAN, HOGAN PROPERTIES, AND DAN RANDOLPH HOGAN, TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants, Bricktown TMK/Hogan Entertainment, L.L.C., Bricktown Parking Investors, L.L.C., Bricktown TMK/Hogan Parking L.L.C., OKC Athletic Club Limited Partnership, BAP Bricktown L.L.C., TMK/Hogan, Hogan Properties, and Dan

Randolph Hogan, ("Defendants")[1], submit this Consolidated Reply to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss and in support thereof would show the Court:

I. PLAINTIFFS CANNOT CONVERT DEFENDANTS' PROPER MOTIONS TO DISMISS INTO MOTIONS FOR SUMMARY JUDGMENT.

A. Attaching the Written Demand and Published Opinions Does Not Require That Defendants' Motions to Dismiss be Treated as Motions for Summary Judgment.

Defendants have properly filed motions to dismiss Taxpayers' Petition based on *res judicata* grounds. *Res Judicata* based on a prior adjudication is proper grounds for a motion to dismiss filed under 12 O.S. § 2012. *Marshall v. Ford Motor Co.,* 1973 OK 17, ¶14, 507 P.2d 912, 914; *Pruitt v. Hammers,* 1955 OK 348, ¶11,292 P.2d 157, *158-59; Adams v. City of McAlester, 1955* **OK** 216, ¶ ¶1, *5,* 286 P.2d 726-27; *Cain by and through Pierce v. Meredith,* 1994 OK CIV APP 116, ¶5, 884 P.2d 860, 861. Although Section 2012(B) requires that a motion to dismiss be treated as a motion for summary judgment where matters outside the pleadings are presented for consideration, materials evidencing the decision in a prior action involving the same parties and facts do not constitute matters outside the pleadings requiring such treatment. 12 O.S. § 20 12(B); *Marshall v. Ford Motor Co.,* 1973 OK at ¶1, 507 P.2d at 914.

In *Marshall v. Ford Motor Co.,* the Supreme Court reversed the trial court's denial of the defendant's motion to dismiss

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[1] Each Defendant continues to maintain its separate and distinct grounds for dismissal; nevertheless, for the convenience of the Court, Defendants submit this consolidated reply.

where the defendant had attached to its motion to dismiss[2] the amended complaint and amended answer, judgment on the verdict and opinion on appeal from the federal court action. *Id* at 914. The Court found, after considering the materials presented by defendants including the prior judgment, that the plaintiff was "barred by the judgment in the prior federal action against the same defendant for the same damages" and dismissed the action. *Id* at 914. (See also, where although the Court did not find the plaintiffs claims were barred by *res judicata,* the Court reviewed the attached documents evidencing the decision in the prior, related case and treated the matter as a motion to dismiss, not a motion for summary judgment. *Runyan v. City of Henryetta,* 1958 OK 3, ¶4, 321 P.2d 689. 692.)

In this case, Defendants have supplied the Court with a published opinion, *City of Oklahoma City v Oklahoma City Urban Renewal Authority et al.,1999* OK 71, 988 P.2d 901 ("Tal I")[3], affirming the denial of Plaintiffs' Motion to Intervene in the Declaratory Judgment Action (the "Declaratory Judgment Action") filed by the City of Oklahoma City (the "City") on January 26, 1999. The Declaratory Judgment Action was a prior action based on the same claims against the same

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[2] The dispositive motion was explicitly captioned by the defendant as a Motion to Dismiss Plaintiffs Cause by Reason of Res Judicata and Estoppel by Judgment.

[3] The Defendants also attached the published opinion *of State of Oklahoma ex rel., Tal v. Norick et al.,* 1999 OK *85,* 991 P.2d 999, as a legal precedent for the convenience of the Court, and the Plaintiffs' Written Demand which was incorporated by reference in the Petition and which serves as the statutory prerequisite to an alleged qui *tam* action.

[4] The addition of the Hogan Defendants and various City and Authority officials and counsel to Plaintiffs' Petition does not change the basic nature of the claims raised in the Written Demand.

defendants for the same damages.[4] Plaintiffs acknowledge in their Petition that their *qui tam* action in the case at bar is based upon the Written Demand filed January 12, 1999, the *same* Written Demand that initiated the Declaratory Judgment Action and which Plaintiffs alleged gave rise to their right to intervene. Petition, ¶ 1. This Court, reviewing only the Petition and the published opinion, can determine that Plaintiffs' claims against the Defendants are precluded. The law in Oklahoma is well settled that attaching these materials does not require that the motions to dismiss be treated as motions for summary judgment.

B. Plaintiffs' Petition on Its Face Discloses the Adverse Outcome of the Prior Adjudication.

Plaintiffs' Petition also clearly identifies on its face that a prior action was adjudicated. The Petition refers in numerous allegations to the inadequacies of the Declaratory Judgment Action filed by the City. Petition, ¶¶ 2-9. The Petition also acknowledges Plaintiffs' unsuccessful motion to intervene. Petition, ¶ 8. Finally, the Petition alleges specific wrongdoing by the counsel and witnesses participating in the Declaratory Judgment Action. Petition, ¶¶ 87(c), 88(g), 89(h), 90(e), 101(u), 101(v), and 101(w). Each of these allegations in the Petition provides evidence on the face of the pleadings of a prior adjudication and of an adverse decision. Plaintiffs should not be allowed to avoid dismissal of this Petition on grounds of *res judicata* merely by concealing from the Court the finality of the adverse outcome of this prior adjudication.

C. All Extraneous Evidence and Materials in Plaintiffs' Brief Should Be Disregarded by the Court in Deciding the Motions to Dismiss.

Plaintiffs in their Brief in Opposition to Defendants' Motions

to Dismiss (the "Opposition Brief") cite and attach various materials outside the pleadings in support of their arguments, including, without limitation, an Affidavit from lead Plaintiff, Moshe Tal. The facts derived from these outside materials should not be considered by the Court because it is not appropriate to treat Defendants' Motions to Dismiss as motions for summary judgment.

As discussed in detail above, the exhibits attached to Defendants' Motions to Dismiss do not act to convert the motions to dismiss to motions for summary judgment. Furthermore, Plaintiffs cannot, by attaching extraneous material in support of their Opposition Brief, cause summary judgment analysis to be required. Only the materials attached to the Motions to Dismiss are relevant in determining whether summary procedure is appropriate. "If a dismissal motion tenders for consideration materials dehors the pleadings in the case at bar, summary judgment procedure must be utilized." *Oulette v. State Farm Mut. Auto Ins. Co.,* 19940K 79, ¶ 6.n.10, 918 P.2d 1363, 1370, n. 10 (emphasis added, emphasis omitted). Plaintiffs cannot *unilaterally* convert the Defendants' Motions to Dismiss to motions for summary judgment. If this were permitted, plaintiffs would routinely attempt to distract the Court from the deficiencies of their petitions with potential factual disputes introduced in attached materials.

II. PLAINTIFFS' PETITION MUST BE DISMISSED BECAUSE PLAINTIFFS' DUE PROCESS ARGUMENT IS A SHAM.

A. Plaintiffs are in Privity with the City Under Oklahoma's *Qui Tam* Statutes and Have No Independent Cause of Action.

Plaintiffs' due process arguments have no merit. Plaintiffs are bound by the judgment rendered in the City's Declaratory Judgment Action because the City adjudicated any possible claim that the Plaintiffs may have been statutorily entitled to bring as *qui tam* plaintiffs. Plaintiffs' Petition based on a *qui*

tam action does not implicate the due process concerns, about the preclusive effect of a judgment to which they were not a party , that are applicable to a representative or derivative action. Plaintiffs base their qui *tam* action solely on the statutory authority of 12 O.S. §§ 372 *et seq.*. Plaintiffs have not been denied their "full and fair hearing" on the issues raised in the Written Demand because they were never entitled to a hearing in the first place.

Plaintiffs have had their day in court. By statute, there is an identity of interest between Plaintiffs and the City. A *qui tam* plaintiff has no interest divisible from the municipality whose claim it espouses; in fact, a signatory to a *qui tam* demand has no standing at all if the municipality responds in good faith to a proper demand. *Braly v. Ford,* 1941 OK--, 116 P. 2d 988. Here, it was finally determined by the Court that Plaintiffs have no independent standing.

Plaintiffs have no independent cause of action; they would have had standing to bring the City's claim under § 373 *only* had the City failed to act. Under Oklahoma's *qui tam* statutes, a taxpayer may not bring a suit in his own name to recover property for the benefit of a municipality. A taxpayer must bring the claim *in the name of the state,* and may do so *only* after the municipality has failed to respond to a written demand. 62 O.S. §§ 372-373; *Vaughn v. Latta,* 1934 OK - -, 33 P. 2d 795, 796. If the municipality responds to the written demand, the taxpayers have no independent cause of action, because any claim they might be permitted to raise if the municipality failed to respond is identical to the claim of the municipality. *Id.*

Plaintiffs here are in privity with the City because their claims arise solely from the Written Demand. Petition, ¶ 1. By serving the Written Demand, Plaintiffs invoked by their own election the *qui tam* statutory process. Pursuant to that process, *qui tam* plaintiffs only have a claim upon the failure of the City to act. When the City filed the Declaratory Judgment Action, any potential claim the Plaintiffs may have wanted to institute

based on the Written Demand was extinguished. By statute, once the Declaratory Judgment Action was filed, the City was the only party entitled to pursue those claims, on behalf of itself, the Plaintiffs and all taxpayers. As the Supreme Court said,

> When Oklahoma City filed its declaratory judgment action, it placed in issue T.A.R.'s contentions for resolution by an unbiased court. T.A.R. was entitled to no more.

Tal I, 1999 OK 71,¶28, 988 P.2d 901, 907.

B. Plaintiffs Admitted that the City Adequately Represented Their Interests When They Sought Permissive Intervention Rather Than Intervention as a Matter of Right.

It is critical, too, to bear in mind that Plaintiffs' motion to intervene in the Declaratory Judgment Action was based on the *permissive* intervention statute found at 12 O.S. § 2024.B.2. Plaintiffs did not seek to intervene as a matter of right. See *Tal I*, 1999 OK 71, ¶ 15. This failure is Plaintiffs' *concession* that the City was adequately representing all taxpayers in the Declaratory Judgment Action. Had the City's conduct in the Declaratory Judgment Action been truly "antagonistic" to the interests of the taxpayers, as they now claim, they would have sought to intervene as a matter of right under 12 0.S. § 2024.A. By seeking non-mandatory intervention, Plaintiffs conceded that they were not necessary parties to the Declaratory Judgment Action. 12 0.S. § 2024. Plaintiffs have no due process claim, and their Petition must be dismissed.

C. Plaintiffs Are Precluded From Re-Litigating the Adequacy of the City's Representation To Support a Due Process Claim.

Even if Plaintiffs were not privies of the City in the Declaratory Judgment Action, they still have no due process

claim. Plaintiffs' claim of a due process violation is based on the argument that the City did not adequately represent their interests in the Declaratory Judgment Action. Plaintiffs cannot effectively make that argument because the issue of adequate representation was conclusively determined against Plaintiffs when they lost, in the trial court and on appeal, their motion to intervene. The adverse judgment denying Plaintiffs' motion to intervene precludes Plaintiffs' collateral attack on the adequacy of the City's representation in support of any claim of violation of due process.

When the trial court denied Plaintiffs' motion to intervene and the Supreme Court affirmed the denial, the issue of Plaintiffs' right to challenge the economic development agreements[5](the "Agreements") was conclusively determined. *Tal I,* 1999 OK 71, ¶ 16, 988 P.2d at 906. Plaintiffs are precluded by the principle of *res judicata* from arguing in this Petition that the City did not represent their interests and that due process protects them from the preclusive effects of the trial court's determination as to the validity of the Agreements.

Even if a due process claim based on the adequacy of the representation of the City was plausible, Plaintiffs brought, argued and appealed the motion to intervene and are most assuredly bound by the resulting judgment that the Plaintiffs had no right to intervene and that the City adequately represented their interests. *Temeron, Inc. v. Ferraro Energy Corp.,* 1993 OK CIV APP 97, ¶ 10, 861 P.2d 319, 323 (all issues raised in a petitioning intervenor's motion may be afforded full

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[5]Parking Redevelopment Agreement, dated December 19, 1997, and a Ground Lease, dated February 4, 1998, by and between the Oklahoma City Urban Renewal Authority and Bricktown Parking Investors, L.L.C. and Redevelopment Agreement, dated July 21, 1998, by and between the Authority and Bricktown TMK/Hogan Entertainment, L. L.C. (collectively, the "Agreements")

preclusive effect).

Plaintiffs moved to intervene in the trial of the Declaratory Judgment Action under the permissive intervention provisions found at 12 O.S. § 2024.B.2. The District Court, in denying Plaintiffs' Motion to Intervene, heard and considered Plaintiffs' argument and authorities, their depositions, and the allegations of Plaintiffs' Written Demand. *Tal I,* 1999 OK 71, ¶ 22, 988 P.2d at 906. The Supreme Court in affirming the denial of Plaintiffs' motion to intervene found that Plaintiffs failed to show that the City had acted in bad faith, which showing was a prerequisite to any right to intervene. *Id* at ¶ 22, 907.

The Supreme Court's conclusions in *Tal I* require but one outcome here: that Plaintiffs Petition be dismissed because its claims, based on the Written Demand, are barred by *res judicata*[6]. The Supreme Court repeatedly found that there was no fraud or bad faith by the City:

> In any event, there is nothing in the record to reflect that Oklahoma City acted in bad faith....
>
> That the disagreements among Council members were resolved in a way that Tal and the other T.A.R. members do not like does not support in any way T.A.R.'s claims that the development Agreements were either fraudulent, unlawful or otherwise inadequate....
>
> There being no showing of fraud or unlawful

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[6]In the Declaratory Judgment Action, Plaintiffs also argued that the City failed to adequately represent their interests because the City requested that the trial court review the allegations of invalidity and either validate or invalidate the economic development agreements and transfers of property. The Supreme Court in *Tal I* rejected Plaintiffs' contentions, holding that the City was not required to support the Plaintiffs' claims in its Declaratory Judgment Action. *Tal I,* 1999 0K 71, ¶ 18.

> activity here, T.A.R. lacks standing to attack the City's decisions.

Tal I, 1999 OK 71, ¶¶ 20-21, 988 P.2d at 906.

The trial court found and the Supreme Court affirmed that the City had adequately represented taxpayer interests in the Declaratory Judgment Action. "... Oklahoma City *was representing the rights of all its taxpayers* and was entitled to the presumption that it would do so in good faith. T.A.R. failed to overcome this presumption.' *Tall,* 1999 OK 71, ¶ 31, 988 P.2d at 908 (emphasis added). The ruling by the Supreme Court as to the issue of representation is *res judicata* on Plaintiffs' due process arguments here. Plaintiffs are precluded from arguing that the City did not represent their interests and without such lack of representation, Plaintiffs have no standing to bring this Petition.

Without the argument that the City failed to represent Plaintiffs' interests in the adjudication of the Declaratory Judgment Action, Plaintiffs have no grounds for disputing the preclusive effect of the trial court's determination that the Agreements are valid, lawful and constitutional in all respects. Since the City and the Plaintiffs were in privity and the adequacy of the City's representation is unassailable, the validity of the Agreements has been conclusively determined and the Petition must be dismissed.

D. Plaintiffs' Cited Authorities Are Inapposite to the Determination of the Preclusive Effect of the Judgment that the Agreements Are Lawful.

Plaintiffs' arguments and authorities in their Opposition Brief do not alter the conclusion that the Petition must be dismissed for failure to state a claim. The authorities on which Plaintiffs rely are without exception predicated upon proof of conflict of interest, bad faith or inadequate representation — all points that Plaintiffs tried and failed to establish by their motion to intervene and subsequent appeal.

Plaintiffs' cited authorities simply do not have relevance in this case. In each case upon which Plaintiffs rely, the linchpin of the decision was a finding by the court of conflict of interest, bad faith or inadequate representation, arguments which are precluded in the case at bar. The Supreme Court in affirming the denial of the motion to intervene in *Tal I* expressly rejected Plaintiffs' allegations of conflict of interest, bad faith or inadequate representation. The Supreme Court held that the Plaintiffs failed to prove any basis to support taxpayer standing. *Tal I,* 1999 OK 71, ¶ 31, 988 P.2d at 908. Plaintiffs' authorities cannot change that result.[7]

Plaintiffs' position as to *res judicata* collapses without a finding of inadequate representation, and the issue of adequate representation was decided as a matter of law in the Plaintiffs' appeal of the denial of the motion to intervene. Plaintiffs cannot escape the preclusive effect of *Tall,* which held that the City property represented *all* taxpayers including Plaintiffs, in responding to the Written Demand. The fact is that Plaintiffs failed in the Declaratory Judgment Action to demonstrate

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[7]The authorities cited by Plaintiffs are each based on the arguments precluded by the judgment in *Tall* from being raised here. See, e.g. *Hansherry v. Lee,* 311 U.S. 32 (1940) (requires inadequacy of representation and lack of identity of interest in the prior action); *Richards v. Jefferson County,* 517 U.S. 793, 802-803 (1996) (where taxpayers allege misuse of public funds, states have wide latitude to establish procedures not only to limit number of judicial proceedings that may be entertained but to determine whether to accord taxpayer any standing - a finding of adequate representation in a prior suit is a bar to taxpayer standing); *Johnson v. American Gen. Ins. Co.,* 296 F. Supp. 802 (D.C.D.C. 1969) (differing interests of shareholders allowed avoidance of prior judgment); *Consumers Union* **v.** *CPSC,* 590 F. 2d 1209, 1217 and 1222 (9th Cir. 1980), rev'd (445 U.S. 375 (1980) (unless interests diverge government may represent interest of citizens).

conflict of interest, bad faith and inadequate representation, and "[t]his ends the inquiry." *Tal l,* 1999 OK 71, ¶ 19, 988 P.2d at 906. Plaintiffs are not legally entitled to a second bite at the apple. The Petition must be dismissed with prejudice.

III. PLAINTIFFS' PETITION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE TRIAL COURT'S FINAL JUDGMENT WHICH HELD THE AGREEMENTS NOW CHALLENGED CONSTITUTIONAL AND VALID IN ALL RESPECTS.

A. The Validity of the Agreements Has Been Conclusively Determined As To Plaintiffs.

Plaintiffs concede that under Oklahoma law any claim which was or could have been addressed in the Declaratory Judgment Action is barred from relitigation by any party or its privies. Opposition Brief at pp. 16-17, citing *Temeron, Inc. v. Ferraro Energy Corp.,* 861 P. 2d 319, 323 (Okla. App. 1993). As established in Proposition II above, Plaintiffs' *qui tam* claims herein are barred from re-litigation because Plaintiffs are in privity with the City; the very nature of a *qui tam* action makes any other conclusion impossible, and any arguments to the contrary are barred by *res judicata.*

The Court in the Declaratory Judgment Action, after a hearing on the merits, determined that the Agreements challenged in the Written Demand, and challenged again by Plaintiffs in their Petition based on the Written Demand, were lawful. *Tall,* 1999 OK 71, ¶¶ 7, 988 P. 2d at 904. As the Supreme Court acknowledged in *Tal I.*

> The case has been tried and the record developed supports the trial court's finding that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the agreement were adequate. This ends the inquiry and T.A.R.'s expression of a contrary

opinion in its Demand, without factual support, does not change the result.

Tal I, 19990K 71,¶ 19.

The trial court's judgment that the Agreements are valid is final and non-appealable. Plaintiffs' Petition is nothing more than an impermissible collateral attack on the final trial court judgment confirming the lawfulness of the Agreements. As a privy of the City in the Declaratory Judgment Action, Plaintiffs are precluded from collaterally attacking the validity of the Agreements because such validity was conclusively determined when the trial court's finding of lawfulness was final. Plaintiffs' Petition is based solely on Plaintiffs' claims in the Written Demand that the Agreements are illegal. Since the legality of the Agreements is unassailable, the Petition must be dismissed as to the Defendants.

B. No Liability Can Be Established Against Any of the Defendants in the Absence of an Invalid Agreement.

The *qui tam* statutes create joint and several liability based on an unlawful public contract. 12 Okla. Stat. § 372. As the Agreements' validity is unassailable, Plaintiffs attempt to hold the Defendants[8] liable either as parties to the Agreements or for their alleged knowledge of or benefit from the Agreements is clearly barred by *res judicata.* The *sole* ground for liability

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[8]Plaintiffs make no independent allegations against defendants OKC Athletic Club Limited Partnership or BAP-Bricktown, L.L.C. and their allegations against the defendants labeled by Plaintiffs as the "Hogan Defendants" are vague and unspecific. Plaintiffs apparently assume that challenging the validity of the agreements justifies the inclusion of these various parties as defendants. As the Agreements' validity has been conclusively determined, Plaintiffs lose even that argument.

under 62 O.S. § § 372-3 73 is based upon being a party to or benefitting from an *"unlawful* or *fraudulent* contract" or *"unlawful or fraudulent* transfer of money or property." 62 O.S. § 372 (emphasis added). The Agreements and any related transfers of property have been fully and finally determined to be *completely legal* and *without fraud* under prevailing law, therefore, no cause of action based on this illegality can exist. Plaintiffs' Petition as to all of the Defendants[9] must be dismissed for failure to state a claim.

IV. PLAINTIFFS' ALLEGATIONS ARE BARRED IN TOTALITY BY THE STATUTE OF LIMITATIONS.

Even assuming Plaintiffs could somehow escape the preclusive effect of the prior litigation, their claims are barred by the six months statute of limitations found at 62 O.S. § 374. That section bars *any qui tam* action filed more than six months after the City's *"refusal, failure, or neglect...* to act upon a written demand." 62 O.S. § 374 (emphasis added)[10]. If the City failed to respond to Plaintiffs' Written Demand of January 12, 1999. this failure occurred on January 26, 1999. the date the City filed the Declaratory Judgment Action. Plaintiffs concede this fact in their Opposition Brief. Plaintiffs allege:

> The *City failed, refused and neglected to bring proper action* to recover the illegally spent Maps [sic] money and illegally transferred property. The evidence clearly shows that the City disputed the Taxpayers' claims. It brought the Declaratory Judgment [Action] solely for the purpose of avoiding the Taxpayers' claims. *Ii is*

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[9]Plaintiffs failed to even address the argument raised by defendants OKC Athletic Club Limited Partnership or BAP-Bricktown, L.L.C. that the Petition contained no allegations against them. Pursuant to Rule 4(e) of the Rules of the District Court, this argument is deemed confessed.

[10]Plaintiffs' concede that the six months limitation applies. They contest only when it was triggered.

> *obvious to the most casual observer* that the interests of the City and Taxpayers' were locked in irreconcilable conflict.

Opposition Brief, P. 24(emphasis added).

Plaintiff's themselves contend that the tiling of the Declaratory Judgment Action was itself a failure to respond to the Written Demand, a failure *"obvious* to the most casual observer.' As this "failure" occurred on January 26, 1999, Plaintiffs' suit filed March 15~ 2000, was instituted well *after* the expiration of the six months statute of limitations. Plaintiffs claims are clearly time barred.

Plaintiffs' reliance on *Taxpayers League of Wayne County v. Wightman,* 28 N.W. 2d *575* (Neb. 1947), likewise compels the conclusion that their claims are time barred. Plaintiffs cite that case for the proposition that "[w]here a City shows its *intent* to dispute or contest the allegations made in the Taxpayers' written demand, it can be *presumed* that the *City has refused* to pursue the Taxpayers demand." Opposition Brief, p.23(emphasis added).

Here Plaintiffs argue strenuously that the City's Declaratory Judgment Action was *on* its *face* an "obvious" refusal to respond to the Written Demand. That refusal occurred. if at all, on January 26, 1999, the date the Declaratory Judgment Action was filed, when Plaintiffs contend the City's manifest intent not to comply with the Written Demand compelled the presumption of failure to comply. This action, filed more than six months later, is absolutely time barred.

A penal statute such as 62 O.S. §§ 372-374 is to be strictly construed according to its terms. *State ex rel. Hettel v. Security National Bank and Trust Company in Duncan,* 1996 OK 53, 922 P.2d 600, 606, rhg. den.; *State ex rel Allen v. Board of Education of ISD No. 74,* 246 P.2d 368. 373 (Okla. 1952). The six month bar to bringing a qui *tam* suit is not severable from the balance of the statute. Plaintiffs' Petition is time barred.

WHEREFORE, premises considered, Defendants Bricktown TMK/Hogan Entertainment, L.L.C., Bricktown Parking Investors, L.L.C., Bricktown TMK/Hogan Parking L.L.C., OKC Athletic Club Limited Partnership, BAP-Bricktown L.L.C., TMK/Hogan, Hogan Properties, and Dan Randolph Hogan move that Plaintiffs' Petition be dismissed with prejudice for all of the reasons as more particularly set forth herein, and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,

/S/ Melvin R. McVay, Jr.

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[Certificate of Service Omitted]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-2000-2052

THE STATE OF OKLAHOMA, ex rel, Moshe Tal, a resident taxpayer of The City of Oklahoma City, Oklahoma & Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Ok1ahoma City, Oklahoma,

Plaintiffs,

vs.

The City of Oklahoma City ("City"), Oklahoma, a municipal corporation; et al.,

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs, Moshe Tal ("Tal") and Taxpayers Against Ripoffs ("T.A.R.") submit this brief in opposition to the Motions to Dismiss of various defendants. The Motions were filed by the *Urban Renewal Defendants* including the Oklahoma City Urban Renewal Authority and related defendants, Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, James R. Tolbert III, William O. ("Bill") Johnstone, Tiana P. Douglas, and Dan Batchelor; the *City Defendants* including the City of Oklahoma City and related defendants including, Kirk D. Humphreys, William O. West, Daniel Brummitt; and the *Hogan Group Defendants* including OKC Athletic Club, BAP Bricktown Parking, TMK Hogan Parking, the Hogan Group including TMK/Hogan, Hogan Property Management, L.L.C., Randy

Hogan. (Collectively "Defendants").

The Defendants all assert that the City's Declaratory Judgment Action is res judicata and, even though T.A.R. was not a party to the action, T.A.R. is precluded from bringing the present action. They additionally assert because the City brought an action in response to T.A.R.'s Written Demand, T.A.R. does not have standing to bring this Qui Tam action[1]. While Defendants' arguments are seemingly plausible, their plausibility evaporates in light of the facts that show that denial of T.A.R.'s right to bring this action is a denial of due process.

T.A.R. is entitled to a full and fair hearing on the claims asserted in its Written Demand. T.A.R. was denied this due process right when the City acted as the taxpayers' putative representative in the Declaratory Judgment action. The record shows that the City's interests in the Declaratory Judgment were antagonistic and in direct conflict with the Taxpayers' interests. This conflict of interest prohibits the judgment in the Declaratory Judgment action from being asserted as res judicata against T.A.R.

STATEMENT OF FACTS

1. On January 12, 1999, T.A.R. filed its Written Demand. - ***See Exhibit A.*** The Written Demand demanded that the City bring an action to declare various agreements between the City, Urban Renewal Authority and Third Parties, illegal and void and to recover all transfers of funds or property made pursuant to these illegal agreements.

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[1] The various Defendants also assert other grounds for dismissal that are not common to the Defendants as a group. Those Defendants are identified and their claims addressed herein.

2. T.A.R. alleged the Agreements, the Parking and Ground Lease agreements (the "Parking Agreements"), the Redevelopment Agreement and the Myriad/Arena heating & cooling plant contracts/construction (the "Power Plant" "Power Plant Agreement") were illegal and void.

3. In each claim, T.A.R. alleged the agreements/contracts were illegal and void because of conflicts of interest of City and Urban Renewal[2] officials, misconduct by City/Authority officials, staff, consultants and beneficiaries of the expenditures. It also alleged violations of the Oklahoma Constitution, violations of the MAPS Ordinance and procedures, as well as violation of City Charter and state laws. See ***Appendix I - Summary of T.A.R.'s 1/12/99 Written Demand.***

4. Three days later, on January 15, 1999, the Municipal Counselor prepared and submitted to the City Council a proposed Resolution to allow him to file the Declaratory Judgment Petition and to ask the court to . . ***judicially confirm the lawfulness and validity of such agreement. Exhibits B-1 (Memorandum) and B-2 (Resolution).***

5. A legal proceeding to ***judicially confirm the lawfulness and validity of such agreement*** was how the Municipal Counselor again explained the Resolution's purpose when he had it placed on the City Council Agenda for a vote. See ***Exhibit C - City Council Agenda (1/19/99) Proposed Resolution, Item VIII-G 1.***

6. The City Council passed the Resolution to allow Municipal Counselor to initiate the Declaratory Judgment Petition as proposed. *See* ***Exhibit D - Resolution (1/19/99)*** . However the initial proposed Resolution had been

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[2] "Authority" or "Urban Renewal" as referred to herein means the Oklahoma City Urban Renewal Authority.

amended to change the word *confirm* to *determine*. ***Exhibit E, Amendments to Resolution.***

7. On January 26, 1999, the Municipal Counselor filed the Declaratory Judgment Petition seeking the court's declaration that the agreements with the Hogan Group Defendants were legal. *See* ***Exhibit F*** (***1/26/99 Petition only - Attachments omitted***).

8. The Petition did not include or even mention in passing, any allegations or charges regarding illegal conduct by City officials, nothing about conflicts of interest, nothing about the power plant, nothing about violations of the MAPS Ordinance, nothing about violation of eminent domain laws, or any other allegations contained in T.A.R.'s Written Demand. *See* ***Appendix I - Summary of T.A.R.'s Claims***.

9. Defendant and Municipal Counselor , Dan Brummitt summarized the City's intent in bringing the Declaratory Judgment action.

   The City brought this action as a declaratory judgment, your Honor, because it was the only thing that we could do to prevent our client, the City Council members, from being subject to personal liability in a lawsuit alleging that these redevelopment agreements are unconstitutional. We took the only action that we could take by bringing this action as a declaratory judgment, we're going to put the agreements in from of the Court. Id., ***Exhibit L***, pp. 35-36

10. In the *Redevelopment Plan* (***Exhibit G***), Urban Renewal is designated as the City's agent and is authorized by the City to act on behalf of the City in undertaking and administering the Redevelopment Agreement. The Redevelopment Agreement also specifically states that the City is the beneficiary of all instruments and agreements.

    ... Redevelopment Plan will be undertaken and

administered by the Oklahoma City Urban Renewal Authority (hereinafter also called the "Authority"), ***acting on behalf of the City of Oklahoma City*** *and pursuant to its authorization to perform and fulfill the specific MAPS objectives assigned herein as well as the undertaking of other approved project activities and purposes.* (Emphasis Added).

Exhibit G - Redevelopment Plan, p. 2.

In Section IV, A, 4 of the *Redevelopment Plan*, it provides:

"***The City of Oklahoma City shall be the beneficiary to all instruments and agreements*** *incorporating land use provisions and building requirements"...* (Emphasis Added).

Exhibit G - Redevelopment Plan, pp. 5-6.

On page 6, Subsection B of the *Redevelopment Plan* it states:

In order to achieve the objectives of the Plan and in order to assist redevelopers in redeveloping property, ***the Authority acting on behalf of the City of Oklahoma City*** *will subject land to be redeveloped to specific regulations and controls at the time of land disposition.* (Emphasis Added).

Exhibit G - Redevelopment Plan, p. 6.

11. Consistent with its goal of **confirming** the validity of the agreements, the City brought the declaratory judgment action against its own agent, Urban Renewal, and the Hogan Group Defendants, the other parties to the agreements. ***Exhibit A***, pp. 6 & 12. This was not the action requested in the Written Demand. See ***Exhibit B-1***, p. 1, ***William West's 1/15/99 Memorandum*** to Mayor & Council acknowledging T.A.R.'s request ... *that the City* ***and Authority*** *and various other public officers take legal action concerning the alleged invalid agreements.*

[Emphasis added].

12. On January 27, 1999, the City's agent, Urban Renewal, filed its answer to the Declaratory Judgment Petition seeking a declaratory judgment in its favor **confirming** the validity of the Agreements with the Hogan Group Defendants. ***Exhibit H - Authority's Answer***, ¶ 3, page 2.

13. The City did not investigate the allegations in the Written Demand. The City did not perform any discovery. It did not take depositions, interview any of the members of T.A.R., submit interrogatories, or take any other steps to obtain evidence supporting or rebutting T.A.R.'s allegations.

14. Neither the City nor its attorneys even attempted to contact T.A.R. or Tal to inquire about any evidence supporting the allegations of conflict of interest, illegal expenditures of MAPS funds or the illegality of the Power Plant agreement. See ***Exhibit I- Tal's Affidavit*** , p. 1, ¶ 3.

15. On or about February 18-19, 1999, Hogan Group Defendants lawyers served subpoenas on members of T.A.R. for depositions to be taken on February 22-23, 1999.

16. T.A.R.'s leader, Moshe Tal ("Tal") informed The Hogan Group Defendants attorneys that he was leaving on a 10 day business trip to Puerto Rico on February 20, 1999 and would not be available for deposition until after March 1, 1999. At the request of The Hogan Group Defendants attorneys', Tal agreed to postpone his trip by one week. ***Exhibit I- Tal's Affidavit*** , p. 1, ¶ 5.

17. On February 22, 1999, at the beginning of Tal's deposition, all attorneys including TMK/Hogan's attorney (Mr. McVay), City's Attorney, Dan Brummitt, and Urban Renewal attorneys, Janis Powers and Dan Batchelor - all

> ... *STIPULATED AND AGREED by and among the attorneys for the respective parties hereto that* ***all objections,*** *except as to the form of the question,* ***are reserved until the time of trial, at which time they may be made with the same force and effect as if made at the time of the taking of this deposition.*** See ***Exhibit J - Tal's Deposition***, p. 4. This stipulation and agreement led Tal and T.A.R. to believe that they would be notified of the trial and would have the opportunity, mandated by due process, to submit their objections and/or rebut any issue. See ***Exhibit I - Tal's Affidavit***, p.2, ¶ 7.

18. The Hogan Group Defendants took the only depositions in the action and those were the depositions of T.A.R. members and Tal. The City's and Urban Renewal's attorneys were present at the depositions. However, the City's and Urban Renewal's attorneys did not ask any questions of T.A.R. members or Tal.

19. The only issues discussed in the depositions were only those inquired into by The Hogan Group Defendants attorneys. None of the City or Authority attorneys attempted to discover or explore what evidence Tal had to support the claims regarding conflicts of interest and other illegal dealings. TMK/Hogan's attorney, Mr. McVay, asked Tal about the conflict of interest claim.[3] He touched these issues briefly. Tal's response was to name a few officials and state that he did not want to make any more

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[3] McVay was asking the questions in a numerical order as set forth in the Written Demand. He asked about the conflict of interest claims when he reached the conflict of interest allegation in Claim I, p. 6. Shortly after the question was asked, Urban Renewal attorney Dan Batchelor asked for a recess. When McVay continued on his orderly questioning, he did not ask about the conflict of interest claims when he reach those claims in Claim II.

accusations until he obtained further evidence. However, McVay did not ask for any documentation or evidence that Tal might have to support the claims. At that point, Mr. Batchelor stood up, and T.A.R.'s attorney (Kennedy) asked if they wanted to take a break. During the recess, Tal saw McVay, Batchelor and Brummitt talking in the hallway. When the deposition continued, McVay did not return to asking anymore questions or make any further inquiries into the conflict of interest claim. Neither City attorney, Brummitt, nor the Authority's two attorneys, Batchelor and Powers, asked any questions about the conflict of interest claims. See ***Exhibit I- Tal's Affidavit***, pp. 2-3, ¶ ¶ 9-11.

20. Tal did not waive his right to read and sign his deposition. He specifically requested a copy of the transcript be sent to him so that he could read it and make corrections before he signed it. ***Exhibit J - Tal's Deposition***, p. 126. Tal did not receive a copy of the deposition, he never had an opportunity to correct and sign it.

21. None of parties advised Tal or T.A.R. that trial was scheduled for March 1, 1999. See ***Exhibit I - Tal's Affidavit***, p.3, ¶ 12 .

22. T.A.R.'s attorney discovered that the trial date was scheduled for Monday, March 1, 1999 when a Daily Oklahoman reporter called the him on Thursday evening, February 25, 1999. See ***Exhibit L - Trail Transcript*** (3/1/99), pp. 13-14.[4]

23. The Hogan Group Defendants filed its trial brief on Friday, February 26, 1999 (one business day before the scheduled trial), and Urban Renewal filed its trial brief on March 1, 1999 - the day of the trial. Trial began at 9:00 a.m.

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[4] ***Exhibit L*** contains only pages relevant to this motion. The full 200 page transcript is available upon request.

Exhibit M, District Court Docket.

24. The plaintiff, the City, the putative representative of the Taxpayers, did not file a trial brief. See ***Exhibit M - District Court Docket.***

25. Besides the original Declaratory Judgment Petition, T.A.R. was not provided with any of the pleadings filed or given any notice of the trial date. ***Exhibit I -Tal Affidavit***, p. 4, ¶ 15 .

26. The sole issue adjudicated at trial was the adequacy of the consideration given for the property transferred to the Hogan Group Defendants.

27. Despite only having one business day's notice of the trial, on the morning of trial, T.A.R.'s attorney appeared before the court to present a motion to intervene and for continuance. T.A.R.'s attorney asked for a one week continuance so that he would have time to prepare his case.

28. Attached to the motion to intervene, was a copy of the Petition T.A.R. proposed to file if it was permitted to intervene but not given a continuance. The petition was limited to the issue of adequacy of the consideration for several reasons, including:

    a. The City, Urban Renewal and TMK/Hogan had limited the litigation to the issue of adequacy of consideration.

    b. T.A.R. was taken by surprise when it discovered trial was going to be held less than five weeks after the Petition was filed and T.A.R.'s attorney was not prepared to draft a Petition on all of the claims asserted in the Written Demand.

    c. Moshe Tal was absent from the country when he and T.A.R.'s attorney discovered that the

trial was set for Monday, March 1, 1999. Tal was the sole person with the knowledge and evidence sufficient to support T.A.R.'s allegations of conflicts of interest and other wrongdoing. See, ***Exhibit I - Tal's Affidavit***, p.1, ¶ 1 and pp. 3-4, ¶ 14.

d. Tal's absence combined with the City's complete neglect of its duty to conduct discovery or otherwise investigate and collect evidence, left T.A.R.'s attorney without the evidence needed to support all of T.A.R.'s claims.

e. The extremely short notice of trial and necessity for T.A.R. to prepare a petition in one business day, left T.A.R.'s attorney without sufficient time or means to prepare a petition addressing all of the allegations raised in the Written Demand that were not raised in the Declaratory Judgment Action.

29. The trial court denied the motion to intervene pursuant to 12 O.S. § 2024. It found that T.A.R.'s interest in adjudicating the sufficiency of the consideration was adequately represented by the City. Accordingly, the court also denied the motion for continuance.

30. The City and Urban Renewal told the Court that adequacy of consideration was the only issue contained in the Written Demand. This misrepresentation of the contents of the Written Demand meant that the court only considered the City's representation on the claim of inadequate consideration when it found that the City was adequately representing the Taxpayers.

31. The City's misrepresentation of the scope of the claims in the Written Demand narrowed the scope of the court's inquiry when it considered whether the City adequately represented the Taxpayers interest in the declaratory

judgment. This narrow scope of inquiry meant that the court did not have:

a. any of the evidence showing the City or Urban Renewal officials' conflicts of interest.

b. Any evidence relating to misconduct on the part of City or Urban Renewal officials or employees.

c. It did not have a "picture" of the City's overall conduct during the litigation and was not fully aware of the procedures employed by the City to keep T.A.R. out of the suit and strictly limit the issue to adequacy of consideration while meticulously evading any of the truly controversial issues charged in the Written Demand.

32. The trial lasted half a day. The City (represented by Defendant Brummitt) called only one witness, Assistant City Manager and former MAPS Program Director Jim Thompson. The examination of Thompson was limited to questions relating to adequacy of consideration of the Parking and Redevelopment Agreements with the Hogan Group Defendants.

33. The City, the putative representative of the interests of all Taxpayers, did not cross-examine any of the witnesses called by the defendants nor did it introduce any evidence or witnesses to rebut the defendants witnesses or evidence.

34. On appeal the trial record was severely limited because the City purposely limited the issues adjudicated to adequacy of consideration and prevented T.A.R. from introducing the other issues contained in it Written Demand. Because of the the City's failure to investigate or even address the other claims in the Written Demand, along with its rush to judgment,. T.A.R., as a non-party, did not have an opportunity to introduce evidence, call

witnesses or cross examine the defendants' witnesses. Thus, the Taxpayers were prevented from presenting the evidence showing the conflicts of interest and the City's misconduct. Pursuant to Sup. Ct. Rule. 3.11, a party to an appeal may not raise issues or present materials that were not presented to the trial court and/or that are not contained in the record.

35. If the City had inquired of T.A.R. or Tal or performed a de minimis investigation it would have discovered that the following City Official has serious conflict of interests. A more detailed information is provided in ***Appendix II - List of conflict of Interest of City Officials and Supporting Evidence***. However, the following is a summary of the conflicts of interests of the following City Officials:

I. **Mayor Kirk Humphreys Conflict of Interest**: (1) Humphreys had been doing business with Randy Hogan for more than five years; (2) Humphreys still owns an interest in Bricktown properties and deceived the City and the public when he announced that he sold his interest in the Bricktown Garage; (3) In addition to his direct interest, Humphreys also has indirect interest in City/Maps public expenditures by way of his partnership with other Bricktown property owners; (4) Humphreys filed three false Financial Interest Affidavits since he took office; (5) Humphreys violated numerous laws including: Article 2, § 8 of the City Charter and other City and State laws including Title 11 O.S. § 38-118 and City Ordinance 17,585 and possibly other civil and criminal law violations.

II. **Fred Jones Hall Conflict of Interest**: (1) Fred Jones Hall illegally holds two public offices (Urban Renewal and Turnpike Authority); (2) Fred Jones has a joint venture/partnership with the Hogans- the East-Wharf -Lake Hefner; (3) Fred Jones-Hall and the

Hogans have other business relationships including other real estate ventures in other parts of the City including in the Edmond area; (4) That four days after the Urban Renewal approved the TMK/Hogan Redevelopment Plan, the Hogans released a lien they had against Fred Jones; (5) Fred Jones Hall has another interest in awarding the Urban Renewal's Agreements to TMK/Hogan, especially the favorable Ground Lease terms because Fred Jones is a General Partner in OKC Athletic Club; (6) The Fred Jones entities, own numerous properties in the downtown area of Oklahoma City and the majority of these properties are located within the Urban Renewal Projects District; (7) Several properties owned by Fred Jones in the downtown area, not only are part of an Urban Renewal Project, but were sold to Fred Jones by the Urban Renewal (for a minimal consideration); (8) Fred Jones companies not only did not develop all the properties it purchased from Urban Renewal for a "redevelopment" purpose, but they sold one of these properties to the Art Council of Oklahoma City (which is mainly "subsidized" with Taxpayers money). i.e., Fred Jones sold (for profit) to the community what the community gave him for almost free. This shows how "poor" the Authority's redevelopment agreements are as far as "safeguards" are concerned.

III. **J. Larry Nichols Conflict of Interest** : (1) in addition to being a commissioner of the Urban Renewal, Nichols is the president and majority owner of Devon Energy Corporation and controls DBC Inc. which owns the Mid America Tower building - adjacent to the new Renaissance Hotel. This property is in an Urban Renewal Project District, thus, Nichols is in violation of Title 11 O.S. § 38-118; (2) TMK/Hogan and Nichols have a business relationship in that TMK/Hogan is under contract with Devon/DBC/Nichols

as the exclusive leasing agent and/or manager of the Mid-America Tower building; (3) Despite his business relationship with TMK/Hogan, Nichols, not only voted for selecting TMK/Hogan as the "Chosen-Best" developer for the south Reno project, but he vigorously promoted the TMK/Hogan agreements.

IV. **James R. Tolbert, III Conflict of Interest**: (1) Tolbert is an Urban Renewal Commissioner and also holds a second official office as Chairman of the Myriad Gardens Authority, in violation of Title 51 O.S. § 6; (2) Tolbert has a personal interest in the Urban Renewal-TMK/Hogan Agreements because he is one of the Bricktown property owners in partnership with TMK/Hogan in the Parking Agreements; (3) Tolbert has personal interests in numerous properties in Bricktown - a clear violation Title 11 O.S. § 38-118; (4). Despite his business relationship with TMK/Hogan he vigorously promoted the TMK/Hogan Redevelopment Agreement.

V. **Former Mayor Ron Norick, Conflict of Interest**: (1) Norick has a business relationship with Fred Jones by way of receiving hundreds of thousands of dollars from Fred Jones in sponsorship of Norick and his son's race car; (2) While he was mayor, Norick approved the sale of numerous parcels of land in the downtown area - through the Urban Renewal to Fred Jones Hall and his entities for a fraction of the true value; (3) Norick, while mayor, also promoted and approved giving the Fred Jones and Randy Hogan the City owned land at Lake Hefner (the East Wharf Project). This was also "given" for a fraction of the true value; (4) Norick also had a business relationship with the Gaylords who own the majority interest in OKC Athletic Club. Norick knew that Fred Jones is also a General Partner in OKC Athletic Club. (5) Norick took part in the negotiation and finalization of the Parking

Agreements between the Urban Renewal and TMK/Hogan, OKC Athletic Club and the Bricktown property owners; (6) Norick, while Mayor, appointed Fred Jones Hall as Commissioner of the Urban Renewal. He also appointed Jim Tolbert as Chairman of the Myriad Gardens Authority; (7) Norick, as Mayor, acting in concert with others, was the "leader" in misleading the Council and the MAPS Board to believe that the Parking Agreements were "temporary", when in fact he knew these Agreements were for a minimum of 10 years and could be extended to 30 years. Norick acted in concert with others in "by-passing" the MAPS Ordinance and MAPS procedures by not submitting the Parking Agreement to the MAPS Board or City Council; (8) Norick also had conflict of interest in regards to the Power Plant and in switching the utilities services from Trigen to OG&E. OG&E has provided Norick with gifts, services and "favors" valued in the tens of thousands dollars.

36. T.A.R.'s right to a full and fair hearing was violated by the City's total failure to investigate, prosecute and introduce evidence on T.A.R.'s claims and its opposition to T.A.R.'s intervention in the Declaratory Judgment.

37. The evidence shows that the City's interest in affirming the Agreements conflicted sharply with the Taxpayers' interest in proceeding against and recovering from those who illegally mishandled Taxpayers' money and the City's property.

38. It should be noted that in the *Tal I* opinion, the Oklahoma Supreme Court stated that: *There is but a single, narrow issue in this case: Did the trial court err in denying T.A.R.'s motion to intervene and for continuance. City of Oklahoma City v. Oklahoma City Urban Renewal Authority,,* 988 P.2d 901, 905 (Okla. 1999) The Court

went on to hold that:

> *Because we conclude that Moshe Tal's petition for intervention was correctly denied, he stands excluded as a party litigant below and has no standing to tender for our review any errors made by the trial court.*

Id. at 906.

39. In their various Motions to Dismiss the defendants have all claimed that the Supreme Court affirmed the trial court's decision that the Agreements were valid and that the City complied with the MAPS Ordinance and procedures. The defendant's reliance is misplaced. The Supreme Court made the limited scope of its opinion quite clear. It was not ruling on the merits of the case. It was merely ruling on the propriety of denying T.A.R.'s motion to intervene and for continuance. Furthermore, the Supreme Court's holding that the Taxpayers did not have right to intervene in the Declaratory Judgment pursuant to Rule 2024, based on the limited facts and evidence contained in the record before the Court, is not co-extensive with a finding that the TAR is precluded from bringing a Qui Tam following the resolution of the declaratory judgment. In fact, the Supreme Court made it quite clear that its decision was based on the ***absence of evidence in the record*** that Oklahoma City acted in bad faith or that the suit was collusive or fictitious. The Court also made it clear that evidence of bad faith, collusion or other wrongdoing on the part of the City would support a finding that the City did not adequately represent the Taxpayer interests.

40. Because of the City's efforts to keep the Taxpayers out of the Declaratory Judgment action, this action is the first opportunity the Taxpayers have had to

demonstrate how the City effectively prevented the Taxpayers from getting facts and testimony in evidence to show that the suit was collusive and that they were prevented from introducing evidence to show that the City's and the taxpayer's interests conflicted, that the City failed to use reasonable diligence in pursuing their claims and because of this, the City's representation was inadequate as a matter of law.

PROPOSITION I

MOTIONS FOR SUMMARY JUDGMENT MUST BE DENIED WHERE THERE ARE GENUINE ISSUES OF MATERIAL FACT.

While defendants denominate their pleadings as Motions to Dismiss, 12 O.S. § 2012(B) explicitly states a motion to dismiss which references outside material will be treated as a motion for summary judgment. *See Rooks v. State Through Oklahoma Corp. Com'n,* 842 P.2d 773, 776 (Okla.App. Div. 3 1992).

Summary judgments are not favored. A motion for summary judgment may be granted only when the pleadings, affidavits, depositions, admissions and other evidentiary materials establish that there is no genuine issue of any material fact, and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, all conclusions drawn from evidentiary materials must be viewed in the light most favorable to the party opposing the motion. Even when basic facts are undisputed, motions for summary judgment should be denied if, under the evidence, reasonable persons might reach different inferences or conclusions from the undisputed facts. *Bird v. Coleman*, 939 P.2d 1123, 1127 (Okla. 1997).

Inquiry into the preclusive effect of representative actions is a fact intensive inquiry. *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994). The factual nature of this inquiry should make such a decision a question for the trier of

fact and inappropriate for summary judgment.

The facts relating to res judicata in this case are highly disputed and to the extent the facts are not disputed, reasonable persons might draw different inferences or reach different conclusions from the undisputed facts. T.A.R. therefore asks the Court to deny the Defendants' Motions to Dismiss.

PROPOSITION II

DUE PROCESS REQUIRES THAT THE TAXPAYERS HAVE A FULL AND FAIR HEARING ON THEIR CLAIMS.

Due process, the right to a full and fair hearing, is the fundamental right underlying Taxpayers right to bring a qui tam action to prosecute fraud against the government in situations where the government fails, refuses or neglects to bring a proper action. Similarly, due process governs whether a judgment in a representative action, such as a qui tam, is res judicata as to non-parties. *Richards v. Jefferson Cty,* 116 S.Ct. 1761, 1768-69, 517 U.S. 793, 802-04, 135 L.Ed.2d 75.

A nonparty's right to due process is violated in a representative or derivative action when the representative party in the litigation has interests that conflict with the nonparty members of the representative class. In *Hansberry v. Lee*, 311 U.S. 32, 37, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the United States Supreme Court held that the lower court violated the plaintiffs' Fourteenth Amendment right to Due Process when it attempted to bind litigants to a judgment rendered in an earlier representative action to which they were not parties and in which there was a conflict of interest between the representative party and the members of the class. *Richards v. Jefferson County Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed. 76 (1996).

To preclude a party from litigating an issue decided in a prior action, due process requires that the party have had a full and fair opportunity to litigate the claim or issue. *Kremer v.*

Chemical Construction Corporation, 456 U.S. 461, 480-81, nt. 22, 102 S.Ct. 1883, 1897, nt. 22, 72 L.Ed.2d 262 (1982); *Sil-Flo, Inc. v. SFHC, Incorporated*, 917 F.2d 1507 (10th Cir.1990). *See also Temeron, Inc. v. Ferraro Energy Corporation*, 861 P.2d 319 (Okla.App.1993). Often the court's determination regarding whether a party had a full and fair opportunity to litigate will include inquiry into:

1) whether there were significant procedural limitations in the prior proceeding,

2) whether the party had the incentive to fully litigate the issue, and

3) whether the effective litigation was limited by the nature or relationship of the parties.

Dorchester Hugoton, Ltd. v. Dorchester Master Ltd. Partnership, 925 P.2d 1213, 1222. (Okla.App. Div. 3 1996). (*quoting* Sil-Flo, Inc., 917 F.2d at 1521).

T.A.R. will show the Court that there were significant procedural limitations in the Declaratory Judgment action, that the City did not have the incentive to fully litigate the issues and that effective litigation was limited by the relationship of the parties.

PROPOSITION III

RES JUDICATA DOES NOT PREVENT TAR FROM BRINGING THE PRESENT ACTION.

Res judicata, or claim preclusion, bars relitigation by the parties or their privies of issues which were or could have been litigated in an action which resulted in a final judgment on the merits. *Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 323 (Okla.App. Div. 3 1993) (*citing Erwin v. Frazier*, 786 P.2d 61, 64 (Okla.1989).

When applying the doctrine of res judicata it is important to remember that in our system of law, there is a 'deep-rooted

historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981); *Martin v. Wilks*, 490 U.S. 755, 761-762, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989). Generally, one is not bound by a judgment in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115 [117], 85 L.Ed. 22 (1940).

A. Exception in Certain Representative and Derivative Actions.

In certain limited circumstances, when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party, he may be bound by the judgment in that action. *See Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S.Ct. 115, 117-118 (1940) (class or representative suits). To bind a non-party to the judgment in the prior case the party seeking preclusion must show: 1) adequacy of representation which is interpreted as incentive to litigate; 2) identity of interests between the two parties; 3) a close relationship between the prior and present parties; 4) participation in the prior litigation; 5) apparent acquiescence; and 6) whether the present party deliberately maneuvered to avoid the effects of the first action. *Louisana Seafood Management v. Foster*, 53 F.Supp.2d 872, 878 (E.D. Louisana 1999).

The courts should tread gingerly in applying res judicata to nonparties, as it is murky corner of the law. *Gonzalo v. Banco Central Corp.*, 27 F.3d 751, 757 (1st Cir. 1994) The perils of nonparty preclusion are real. Prominent among them is the prospect that an overly expansive arrangement of the concept, or too free use of it, may endanger constitutional rights.

B. Conflict of Interest Equals Inadequate Representation of Rights.

A judgment in a representative action cannot be held as res

judicata against persons who were not parties to the earlier action if the putative representative did not adequately represent the non-parties' interests. Representation is inadequate **as a matter of law** where the putative representative has interests that conflict with the interests of the class. It is axiomatic that a representative plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interest of the persons he would seek to represent. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974)(*citing, inter alia, Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The requirement of adequate representation must be stringently applied because members of the class will be bound by the decision of the court. *Id.*

The United States Supreme Court held in *Hansberry v. Lee* that when a representative party has conflicting interests with a non-party, the judgment obtained by the representative party is not binding on the non-party. The Court held that because of the conflict of interest, due process mandated that the parties in the second action would not be bound by the judgment in the first action.

The *Hansberry v. Lee* conflict of interest rule applies in derivative actions. Thus, a stockholder who institutes a derivative suit cannot adequately represent the class of stockholders where the stockholder "may have participated in the wrong complained of, or may have ratified the wrong complained of or acquiesced in it, or have had knowledge of the wrong and been guilty of laches." *Liken v. Schaffer*, 64 F.Supp. 432, 442 (Iowa 1946). In *Johnson v. American Gen. Ins. Co.*, some of the shareholder-directors brought a shareholder derivative action against the corporation. However, the shareholder-directors, as a result of their being directors, were also defendants against whom liability could be imposed. The court held that, as a matter of law, the shareholder-directors had a fatal conflict of interest which would prevent them from adequately representing the other

shareholders. *Johnson v. American Gen. Ins. Co.*, 296 F.Supp. 802, 812 (D.C.D.C. 1969).

C. The Conflicts of Interest between OKC and the Taxpayers Prevent the Judgment in the Declaratory Judgment Action from Precluding the Qui Tam.

Defendant Dan Brummitt best stated the insurmountable conflict of interest between the interests of the City and the Taxpayers' in his opening remarks to the court in the declaratory judgment. Brummitt announced that the City brought the declaratory judgment action to protect their clients, the City Council members, from being subject to personal liability in a lawsuit alleging that the agreements were illegal. Brummitt's additional proclamation. *we took the only action that we could take by bringing this action as a declaratory judgment, we're going to put the agreements in front of the court* made it clear that the City had no intention of investigating and prosecuting the Taxpayers' claims.

As Brummitt proclaimed, the City's interest was in protecting its officials from liability for their illegal actions and having the agreements declared valid. These interests were in direct conflict with Taxpayers' interest in having the City officials' conflicts of interest and illegal conduct investigated and having an action brought to have the agreements declared illegal and void as a result of the official conflicts and misconduct.[5]

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[5] Fraud of a party will undermine the conclusiveness of a judgment where the fraud is extrinsic and deprives the party of the opportunity to appear and present his case. 46 Am.Jur. Jur.2d *Judgments* § 601. T.A.R. feels strongly that the City's conduct in this action rises to the level of being collusive or fraudulent. However, there is sufficient evidence to show inadequacy of representation through conflicts of

The result of these conflicting interests? The City's representation of the Taxpayers' was woefully inadequate. The City did not have any incentive to pursue the Taxpayers claims. It wanted the agreements to remain in place and it did not want to pursue its officials and employees for their illegal conduct. As Brummitt stated, the only incentive it had to bring any action at all was to prevent the Taxpayers from bringing it on behalf of the City. Thus, the City carefully chose the issue, adequacy of consideration, to prevent any inquiry into the questions of illegal conduct and conflicts of interest. Apparently, the City hoped that if it ignored the Taxpayers' other allegations , the allegations and Taxpayers would go away. Based on the avalanche of virtually identical Motions to Dismiss on the grounds of res judicata and lack of standing to bring a qui tam, it is obvious that the City brought the Declaratory Judgment counting on the judgment being res judicata as to the issues of illegal conduct that **could have been brought** in the earlier action.

The conflict of interest and resulting inadequacy of representation between the City and the Taxpayers can also be seen if one considers that all of the City Defendants were intimately involved in negotiating and drafting the agreements and getting the agreements approved, executed and implemented. Several of them spent a great deal of time and energy convincing members of the City Council and MAPS Board to approve the Agreements.

This places the City Defendants are in the precise position

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interest and other conduct depriving T.A.R. of its right to due process. Thus, it is not necessary to prove fraud or collusion. If, however, this Court finds that to avoid res judicata, T.A.R. must provide authorities, evidence and arguments to support a showing of fraud or collusion, T.A.R. requests that it be given the opportunity to amend this response to include such authorities, evidence and arguments.

as were the shareholder-directors in *Johnson v. American Gen. Ins. Co.,* 296 F.Supp. 802, *supra*. A party who is a named or a potential defendant cannot adequately represent the interest of the plaintiff class. *Id.* Nor can someone who participated, ratified, acquiesced or knew about the wrongful conduct and did nothing about it, represent a class of persons opposed to the wrongdoers. *Liken v. Schaffer*, 64 F.Supp. 432, *supra.*

Defendant Jim Thompson was the City Manager who worked with other City officials, employees and attorneys to negotiate, draft, execute and implement the Agreements and Contracts. His involvement in the process puts him in the class of persons who would be liable if the Agreements were held to be illegal and void.

Attorneys West and Brummitt both wrote letters articulating reasons that the terms of the redevelopment agreement were illegal. Despite the fact that the illegalities were not remedied, both attorneys subsequently drafted resolutions recommending the redevelopment agreement be passed and finding that it was legal. West and Brummitt also opined that using property purchased with MAPS funds for private development would be illegal. They also stated that the MAPS property could not be sold for private development unless it was first declared a surplus. Despite these known illegalities, West and Brummitt assisted the City in transferring the MAPS property for private development and in selling the MAPS property even though it had not been declared a surplus. West's and Brummitt's participation and their ratification and acquiescence in the wrongs put their interests in direct conflict with the Taxpayers interests. West's and Brummitt's behavior put them in the class of persons that could be held liable for repayment to the City of triple the value of money and or property transferred, paid or lost under the illegal Agreements.

Then, of course, there is Humphreys' and Norick's interest in preventing disclosure of their direct, indirect, illegal conflicts of interest and their interest in avoiding liability for

any amounts the City may be entitled to recover as a result of the illegal Agreements and Contracts. These men's interests are obviously antagonistic to the Taxpayers' interest in having the Agreements and Contracts declared illegal and void because of Humphreys', Norick's and others conflicts of interest. Certainly, the interest of the Taxpayers in recovering triple the value of money or property transferred under these illegal contracts is antithetical to Humphreys' and Norick's interest in not being held liable for these potentially enormous sums.

The evidence of irreconciable conflicts of interest between the interests of the putative representative, the City, and the interests of the Taxpayers is overwhelming. In *Tal I*, the City's subterfuge in narrowing the issues and then rushing to trial before the Taxpayers could adequately object and present their case, successfully prevented this evidence from getting into the record. Throughout its opinion in *Tal I* the Supreme Court noted that there was no evidence in the record to show that the City's representation was inadequate. For the first time in this action, the Taxpayers are able to present this evidence to the district court and, if need be, the Supreme Court, so that they can see the overwhelming conflict of interests between the City and the Taxpayers that prevented the City from adequately representing the Taxpayers interests.

To hold that res judicata bars the Taxpayers from bringing this action is to deny due process. To hold otherwise is directly contrary to the express holdings of the United States Supreme Court. The Taxpayers have a constitutional right to a full and fair hearing on their claims and if this right is denied by this court, the Taxpayers will seek certiorari believe that it is an issue suitable for appeal to the United States Supreme Court.

PROPOSITION IV

TAXPAYERS HAVE STANDING TO BRING THIS QUI TAM ACTION BASED ON CITY'S FAILURE TO DILIGENTLY PROSECUTE THE ALLEGATIONS CONTAINED IN THE WRITTEN DEMAND.

Resident Taxpayers of a City may, in the name of the State of Oklahoma as plaintiff, bring a qui tam action under §§ 372 and 373 to recover City money or property that was paid or transferred illegally or without authority. Before bringing a Qui Tam, the Taxpayers must first demand in writing that the City officers institute proper proceedings to recover the money and property wrongfully transferred. If the City officials refuse, fail or neglect to institute **or diligently** prosecute **proper proceedings** at law or in equity to recover any money belonging to the City, then the Taxpayers may bring a qui tam to enforce the City's right. *State ex rel. Trimble v. City of Moore,* 818 P.2d 889, 894 (Okla. 1991); *see also, Brown v. City of Warr Acres*, 946 P.2d 1140, 1149 (Okla. 1997).

The failure of a City solicitor to use reasonable diligence in prosecuting a suit instituted by him upon the written demand of a taxpayer constitutes a failure to comply with the written demand. *Williams v. Wilmington*, 171 N.E.2d 757 (Ohio 1960); 74 AM. JUR.2d Taxpayers' Actions § 31 (fn 80). "The failure of a City solicitor to use reasonable diligence in prosecuting an injunction suit instituted by such solicitor at the written request of a taxpayer . . . constitutes a failure to comply with the written request of the taxpayer within the meaning of those sections, and authorizes such taxpayer to prosecute such suit in his own name on behalf of the municipality." *Williams v. Wilmington*, 171 N.E.2d at 762-63.

Where a City shows its intent to dispute or contest the allegations made in the Taxpayers' written demand, it can be presumed that the City has refused to pursue the Taxpayers demand. *Taxpayers League of Wayne County v. Wightman*, 28

N.W. 2d 575 (Neb. 1947).

When the government brings an action on the written demand, the judgment in that action **will not preclude a derivative action by the citizens**, where there is evidence of a conflict between the self-interest of the government officials and the interest of the citizens. *Consumers Union v. Consumer Product Safety Comm'n*, 590 F.2d 1209, 1217-1218 (C.A. 1980) *reversed on other grounds*, 100 S.Ct. 1194, 445 U.S. 375, 63 L.Ed.2d 245 (1980) (*emphasis added*).

"Of their nature false claims act matters are typically complex and document intensive, requiring considerable investigation." *State Qui Tam Enforcement: Some Practical Perspectives,* N98CFCB ABA-LGLED K-13, *ABA Center for Continuing Legal Education National Institute on the Civil False Claims Act and Qui Tam Enforcement*. When the government decides to bring an action based upon a written demand, diligent prosecution requires that the government investigate the allegations and develop the facts in a thorough and detailed fashion. *Id.*

The City failed, refused and neglected to bring a proper action to recover the illegally spent MAPS money and illegally transferred property. The evidence clearly shows that the City disputed the Taxpayers' claims. It brought the Declaratory Judgment solely for the purpose of avoiding the Taxpayers' claims. It is also obvious to the most casual observer that the interests of the City and Taxpayers' were locked in irreconcilable conflict. Furthermore, the City failed to conduct any investigation into the facts supporting or refuting the Taxpayers' claims.

The City's actions, interests and failure to act are sufficient to support a finding that the City refused, failed and neglected to bring a proper action to redress Taxpayers' claims. Thus, the Taxpayers have standing to bring this qui tam action.

PROPOSITION V

THIS ACTION WAS BROUGHT WITHIN SIX MONTHS AFTER THE CITY FAILED OR NEGLECTED TO BRING A PROPER ACTION TO ADDRESS THE TAXPAYERS WRITTEN DEMAND.

A qui tam action must be filed within six months of the City's "refusal, failure, or neglect of the proper officers to act upon the written demand." 12 O.S. § 374. In *Tal v. Norick*, No. 93,273. Supreme Court of Oklahoma, Oct. 26, 1999 the Oklahoma Supreme Court held that a qui tam action based on a previous T.A.R. written demand was premature until the conclusion of the appeal on the Declaratory Judgment action instituted by the City. Thus, because the qui tam would be premature prior to the conclusion of the appeal in *Tal I,* it is the date of the Supreme Court's mandate, at the conclusion of the appeal, from which the six month statute of limitations began to run.

The mandate of the appellate court is the concluding event of the appellate process. The appellate court's ruling is merely provisional until mandate issues. The mandate communicates and signifies the finality of a higher court's appellate disposition. *Cartwright v. Atlas Chemical Industries, Inc.,* 623 P.2d 606, 610 (Okla. 1981). Mandate is governed by Sup. Ct.R. 1.16 which provides that mandate shall be issued upon conclusion of the matter on appeal.

The last decision handed down by the Oklahoma Supreme Court in *Tal I* was the order denying T.A.R.'s motion for rehearing on September 30, 1999. *Tal I* was finally concluded on October 26, 1999 when the Supreme Court issued mandate.

The Declaratory Judgment action was not final until the Supreme Court issued mandate on October 26, 1999. T.A.R. brought this action on March 15, 2000. That was less than five months after *Tal I* was finally concluded on appeal. It was not

until the conclusion of the appeal that T.A.R. could bring its Qui Tam based on the City's failure to diligently prosecute the matters in the Written Demand.

PROPOSITION VI

THE TAXPAYERS PROPERLY ASKED THE COURT TO EXERCISE ITS POWER TO INSTRUCT THE CITY TO HAVE THE APPROPRIATE AUTHORITIES INITIATE PROCEEDINGS TO INVESTIGATE CERTAIN OFFICIALS CONFLICTS OF INTEREST, CONDUCT AND IF NECESSARY REMOVE THEM FROM OFFICE.

T.A.R.'s Written Demand and Petition allege that the City officials violated various statutes and sections of the City charter that prohibit officers from having conflicts of interest, from holding dual offices and hold them liable for neglecting their duties. In some instances, violation of these laws renders the contracts void. Violation of these laws is also grounds for forfeiture or removal from office. Specifically these laws provide:

Under City Charter, Article II section 8. When the Mayor or any City Council members have a financial interest in any expenditure of the City "shall disqualify him and he shall forfeit his office."

Under City Charter, Article IV Section 11. Officers and employees of the City are prohibited from having any interest, direct or indirect, in any contract with the City. Violation of Section 11 "shall be deemed a cause for the removal from office or employment of such officer or employee."

Under City Charter, Article IV Section 7. A City Official cannot hold two offices, of whatever kind or nature.

51 O.S. § 6 also prohibits dual public office holding. Section 6's prohibitions have been interpreted by the Oklahoma Attorney General as barring a person from holding office as a commissioner of a municipal urban renewal authority and as

a trustee of public trust. Op.Atty.Gen. No. 82-35 (March 23, 1982). Similarly, a person is prohibited from being a member of the turnpike authority while holding the position of a regional hospital trustee. Op. Atty Gen. No. 85-58 (May 13, 1985).

Extant Oklahoma law holds that when a person takes a second office in violation of 51 O.S. § 6 he automatically forfeits the previously held office.

A. T.A.R. Has Not Asked the Court to Remove Any City Officials.

In its Petition, T.A.R. does not ask the court to remove any City officials. Rather, T.A.R. asks the Court to exercise its authority to issue mandamus and, upon a decision of the court or jury finding the defendant City Officials guilty of the charges, order the City, as a party to this action, to institute proceedings to investigate the cause for removal from office and determine whether or not to remove that person from office.

The discretionary power is vested in the governmental entity of determining when a suit shall be brought, but that means legal discretion. *Berry v. McLeod*, 492 S.E.2d 794, 801 (S.C. App. 1997). "Where it clearly appears that power is abused, the governing body places itself outside the protection of the rule stated, and may be compelled to act, or in some instances further remedies may be resorted to." *Id., (quoting Ex parte Hart,* 190 S.C. at 479, 2 S.E.2d at 54).

> If a county or other corporation has a plain cause of action for an injury done to it, that should be enforced for the protection of its members, and its governing body refuses to perform its plain duty in the premises, our system of jurisprudence is by no means so weak that justice can thereby be defeated. On the

> contrary, any member of the corporation, by reason of his indirect interest therein, suing in behalf of himself and all similarly situated, may set judicial proceedings in motion, making the corporation a defendant, as trustee for all of its members, and thereby enforce the rights of the corporation.

Berry v. McLeod, 492 S.E.2d 794, 801 (S.C. App. 1997) (citations).

Mandamus may be employed to remedy an offical's refusal to perform a plain legal duty resulting from an office, trust or station. *Aven v. Reeh*, 878 P.2d 1069, 1074 fn 5 (Okla. 1994).

The City has refused to perform its duty to investigate illegal conflicts of interest and misconduct and self dealing by its officials and employees and, if necessary, remove those people from office. It also has a duty to remove its officials who hold second public offices in violation of laws prohibiting dual office holding. The City has abused its discretion. The court may rightfully exercise its power of mandamus and compel the City to perform it's legal duty.

PROPOSITION VII

ALL PERSONS WHO HAD NOTICE OF THE FACTS THAT MADE THE CONTRACTS AND TRANSFERS ILLEGAL AND WHO EITHER MADE THE CONTRACTS OR BENEFITTED THEREFROM ARE NECESSARY AND PROPER PARTIES TO THIS ACTION.

Under 62 O.S. § 373 in a qui tam action, joint and several liability is imposed upon "every person having notice of facts (rendering the contracts or transactions with the City illegal) who either makes a contract with county or receives benefit involving improper payment of money or improper transfer of property."

In *State of Oklahoma ex rel. G.E. Hettel v. Security Natl Bank*

& Trust Company in Duncan, 922 P.2d 600 (Okla. 199), plaintiff brought a qui tam action challenging the legality of the county's issuance of bond in support of loans made by lead and participating banks to a business that eventually defaulted on the bond. The participating banks moved for summary judgment alleging that they could not be held liable for damages in the Qui Tam because there was no evidence that the banks had knowledge of the illegality of the bonds or the loans. The trial court granted summary judgment dismissing the action against the participating banks. The Oklahoma Supreme reversed, holding that it was reversible error to grant summary judgment. The Supreme Court held that in a qui tam action if there is evidence that a defendant has notice of the facts rendering the contract, payment of money or transfer of property illegal, that defendant is a proper party to the action and can be held liable for amounts recovered in the qui tam.

The City Defendants, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt, have argued that they cannot be held liable for any of the amounts recovered as a result of the illegal transfers and payments.[6] In a similar vein, several of the defendants OKC

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[6] The City Defendants complain that the Taxpayers cannot bring an action questioning the legality of the Power Plant Contracts because the decision to build the Power Plant was discretionary. This position totally misapprehends the nature of the action and the evidence supporting the claim. The Taxpayers claim the power plant agreement is illegal based on official misconduct and misconduct of OG&E. There is no question as to whether the Power Plant Contracts was a good or bad idea. The question is whether illegal means were used to obtain the Agreement and the building of the Power Plant. The illegality of the Agreement is patently evident from the $20 million judgment that Trigen obtained against OG&E for its illegal conduct in obtaining

Athletic Club, BAP Bricktown Parking, TMK Hogan Parking, the Hogan Group including TMK/Hogan, Hogan Property Management, L.L.C., Randy Hogan, contend that the Petition does not contain any specific allegations of wrongdoing against them. Furthermore, they claim that they cannot be held liable for the wrongdoing of a limited liability corporation of which they are a member. Defendants move from a false premise to an erroneous conclusion.

Everyone of these defendants, individually, had notice, if not actual knowledge, of the facts making these contracts and transfers illegal. As for the City Defendants, some of them will benefit directly from the illegal agreements. All of them acted in concert to make the contracts. There is no question that the Hogan Defendants made the contracts and will benefit from the illegal payment of money, the illegal agreements and the illegal transfers. Pursuant to Section 373 all of these defendants are potentially liable for the return of three times the money and/or value of property transferred pursuant to the illegal transactions.

The City Defendants and Hogan Defendants are not shielded from being named as parties in this action nor are they exempted from liability. They are all proper defendants based on their notice if not knowledge of the facts rendering the agreements illegal. Section 373 imposes joint and several liability on each individual based on their notice or knowledge and their connection and/or benefit from the illegal

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the Power Plant Contracts and getting the City to build the Power Plant. In addition to anti-trust violations, the Trigen jury also found that OG&E had bribed City officials. The City officials exercise of discretion in deciding whether to accept bribes, is not the type of discretion that cannot be questioned by the Taxpayers. The City Defendants' assertion that the legality of the Power Plant Contracts is immune from inquiry cannot withstand scrutiny.

agreements, transfers and payments. Each of these defendants are necessary and proper parties that are required to be joined to fully adjudicate this action.

CONCLUSION

The facts relating to res judicata in this case are far from undisputed. The evidence shows that there were irreconcilable conflicts between the interests of the City and the Taxpayers. Due process forbids the use of res judicata to bind the Taxpayers to a judgment obtained through representation by a party whose interests conflict with those of the taxpayers. The City failed to diligently prosecute the claims in the Written Demand and the Taxpayers are now entitled to bring their qui tam action.

For theses and other reasons stated above, Taxpayers respectfully request that the Defendants' Motions to Dismiss be denied.

Dated: April 20, 2000.

RESPECTFULLY SUBMITTED,

/S/ MaryGaye LeBoeuf
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[Certificate of Service, Appendix I-III, and Exhibits A-ZZ Omitted]